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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-351

PSG Co., an Oregon corporation,

Petitioner,

—vs.—

EL SALTO, S.A., Escuintla, Guatemala, C.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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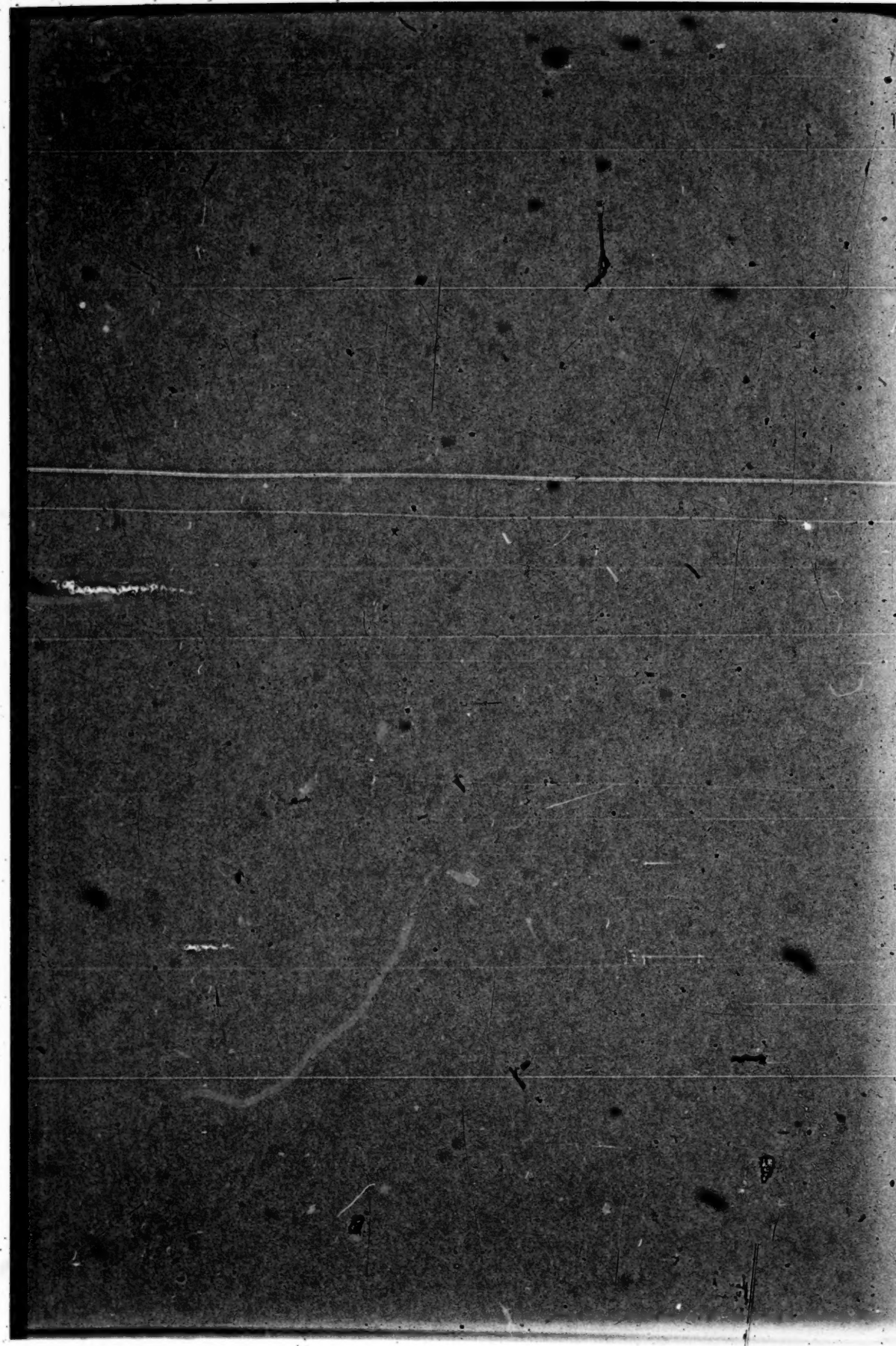

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In 1965, PSG Co., a Portland, Oregon, firm, secured appointment as the exclusive agent for El Salto, S.A., a Guatemalan coffee and sugar producer, to sell El Salto's products in the United States at a commission of 2½%. During 1966 and early 1967, under this arrangement, El Salto shipped 400,000 pounds of coffee.

At the time, Philip Greenberg, PSG's principal, was also speculating in the commodity futures market. His fortunes took a turn for the worse. So he helped himself to the proceeds of the El Salto coffee sales.[1] El Salto demanded

[1] As well as to a quarter million dollars of the proceeds of sugar sales of the Guatemalan Sugar Association, for which he was also agent. *See* Asociacion de Azucareros de Guatemala v. United States National Bank of Oregon, 423 F.2d 638 (9th Cir. 1970).

A third dispute to emerge from the ruins of Greenberg's financial ambitions was, incidentally, PSG Co. v. Merrill/Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659 (9th Cir. 1969), *cert. denied* 397 U.S. 918 (1970).

payment. Greenberg wrote a check in partial payment. The check bounced. El Salto sued.

El Salto's suit was principally to recover some $100,000 of coffee payments. El Salto also put forward three smaller claims, one of which was for $5,058.71 of agency commissions, trebled, under Section 2(c) of the Robinson-Patman Act, because PSG had acted as both buyer and agent on the coffee sales. Petitioner now challenges the adverse result below on four grounds. Two of the alleged errors concern trivial questions of state contract and parol evidence law; the other two concern peripheral aspects of the Robinson-Patman Act determination.

1. The Oregon law questions Petitioner raises are whether the supersession of one contract by another is a jury question (Petitioner says never) and whether a jury can consider oral testimony explaining an otherwise vague contractual recitation (Petitioner says not in Oregon).

The two questions are decisively questions of local law. It is absurd to argue they are worthy of this Court's time. Furthermore, both were argued to the District Court and to the Circuit Court. Both Courts ruled against Petitioner. And both Courts were right. Indeed, the Ninth Circuit found Petitioner's position on supersession so devoid of merit that it did not even discuss the issue.

The parol evidence question related to a contract which both the District Court and the jury found had been superseded. So that question is moot. And in any event, the alleged error comes down to whether the trial judge erred in admitting certain testimony. Petitioner had explained at length his version of the transactions, but he objected when an official of Respondent sought to do the same thing. It

was not error to admit that testimony. As the Ninth Circuit said, "the challenged testimony did not contradict the terms of the April 30th agreement." It explained that contract. The jury's answer to Special Issue No. 4 settled the matter.

2. The Robinson-Patman questions Petitioner raises are whether a buyer-agent lucky enough to be caught violating Section 2(c) can pocket the proceeds of the sale (Petitioner says seller is barred from recovering the purchase price of his own goods) and whether the trial judge violated the Seventh Amendment by deciding the Robinson-Patman issue of law (Petitioner says he did).

As to the first point, Petitioner argues El Salto cannot also recover the purchase price of its coffee because El Salto won on the Robinson-Patman Act issue. Petitioner suggests that its violation of Robinson-Patman made the sales contract "illegal"—in short, that Petitioner is to be rewarded with $100,000 of coffee sales proceeds because Petitioner violated the Robinson-Patman Act.

Unfortunately, the law does not provide for such a happy windfall for those who violate it. PSG undertook a fiduciary responsibility as agent for a foreign seller. It then turned its back on its duties as agent, bought the goods in its own name and made a profit for its own account. This was wrong. That wrong does not excuse PSG from paying for the goods. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 752 (1947), squarely holds that a seller can sue for the price of the goods he has sold, even though seller may have violated Robinson-Patman in the transaction. *A fortiori* here, where it is not the seller but the buyer who violated the Act.

Finally, Petitioner argues that it was denied a jury trial on the Robinson-Patman claim. It does not say that the Robinson-Patman issue was decided wrongly. It does not deny that it acted as both agent and principal on the sale of the El Salto coffee. It does not deny that it sold the coffee for its own account and that it also took a commission for itself. It does not say that it did not violate the Act. It claims only that these facts—which were never in dispute—were somehow not before the trial court.

PSG's dual agent-buyer status was agreed to by the parties before the trial, and was plain on the face of the stipulated exhibits submitted to the court. There was never any question as to the facts.[2] The amount of the commission which PSG took on sales to itself was also stipulated (Tr. 367). In short, as the Court of Appeals found, there was no real issue for the jury to decide, and Petitioner's counsel at the time never tried to frame one. There remained only the task of applying the law to those facts.

The court decided the law on the uncontested facts. (And correctly, at that; the case presents no issue of general substantive law.) We had understood this to be a trial judge's responsibility.

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[2] Even after the trial, in its post-trial brief, Petitioner again admitted what had been palpable from the beginning—that it was agent and was also buying the coffee to its own account. It said, "PSG was appointed 'exclusive sales agent,'" and "the confirmations of purchase set forth in agreed facts so far as PSG Co. was concerned were all direct purchases by PSG Co." (R. 88).

It is understandable that present counsel is puzzled as to what happened below. He is the fourth lawyer to represent Petitioner in the swirl of litigation arising out of Greenberg's financial collapse.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 6, 1971

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Certificate of Service

I hereby certify that on this sixth day of October, 1971 three copies of the foregoing Brief of Respondent in Opposition were mailed, air mail, postage prepaid, to Arthur H. Connolly, Jr., 20th Floor—Mills Tower, 220 Bush Street, San Francisco, California 94104, Attorney for Petitioner. I further certify that all parties required to be served have been served.

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